No. 90-1014

In the

Supreme Court of the United States

October Term, 1990

Robert E. Lee, et al.,
Petitioners,

v.

Daniel Weisman, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF AMICUS CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

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26p.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: PAGE

OTHER AUTHORITIES:

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INTEREST OF THE AMICUS

This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court.

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation

of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

STATEMENT OF THE CASE

Amicus incorporates by reference thereto the statement of the case contained in brief of Petitioners.

ARGUMENT

I. Introduction

NSBA filed a brief in this case at the petition level urging this Court's review but informing the Court that NSBA would take no position on the merits because of philosophical differences on the issue among its members. As noted in its earlier brief, Amicus distances itself from the manner in

which Petitioners addressed the issue in their brief. However, Amicus strongly disagrees with the statement of the issue in the United States' brief amicus curiae and with its discussion of the test established in Lemon v. Kurtzman, 403 U.S. 602 (1971), and the cases decided by this Court under that test and, therefore, has been forced to file a brief herein to state its views on the viability of the Lemon test.

U.S. Supreme Court Rule 37.3 requires a brief amicus curiae to identify the party supported or, in the alternative, whether it supports affirmance or reversal of the decision below. Thus, Amicus NSBA has identified the Petitioners as the party supported. However, if given its preference, Amicus NSBA would remain neutral in this case and term its brief in support of the Lemon test.

II. Rejecting the Lemon analysis based on the absence of coercion from practices that accommodate our nation's religious

heritage would undermine establishment clause values recognized in longstanding precedent.

Amicus NSBA strongly disagrees with the position taken by the United States that the Court should take the opportunity in this case to "reconsider the application of the Lemon test to the attempts to accommodate the Nation's religious heritage in our public life." Brief for United States as Amicus Curiae at 8, Petition for Certiorari filed in Lee v. Weisman, No. 90-1014 (U.S. Feb. 22, 1991) (hereinafter, "U.S. Amicus Brief"). While Amicus NSBA recognizes the concerns of many including some members of this Court, regarding the inflexibility and difficulties in applying the Lemon test, see, e.g., Aguilar v. Felton, 473 U.S. 402, 429 (1985)(O'Connor, J., dissenting); Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting), it wholeheartedly concurs with Justice Souter's statement made during his confirmation hearings that the test should not

be abandoned without development of a viable substitute. The analysis proposed by the United States as a replacement for the Lemon test in this case presents no such viable alternative.

A. Absence of coercion is an inappropriate means of determining an establishment clause violation.

To accommodate religious heritage in civic life, the United States urges the Court to replace the Lemon test with a "single careful inquiry into whether the practice at issue provides direct benefits to a religion in a manner that threatens the establishment of an official church or compels persons to participate in a religion or religious exercise contrary to their consciences." U.S. Amicus Brief at 15. This test is potentially more problematic than the Lemon test as it fails to differentiate between the free exercise and establishment clause of the first amendment.

Coercion is a factor appropriately considered when violations of free exercise rights are asserted, however, it should not be co-opted into establishment clause analysis, merely to permit "accommodation" of the Nation's religious heritage. The Court stated in Engel v. Vitale, 370 U.S. 421, 430 (1962):

> "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."

While the issue of voluntariness is an appropriate factor in free exercise cases, the focus in establishment clause cases should be on whether the state's conduct endorses or appears to endorse religion. L. Tribe American Constitutional Law 1284-1285 (1988).

Maintaining this distinction between establishment clause and free exercise analysis is especially important, given that the religious heritage of this country is

extraordinarily diverse and becoming more so.

To use a coercion standard in the manner proposed by the United States would ignore this distinction. Under the proposed analysis, no state religious activity that "simply. . . acknowledge[s] the existence of beliefs important to the community," U.S. Amicus Brief at 17, n. 20, would offend the Constitution unless one is coerced into participating in it. It would not matter how extensive the religious activities became or how offensive the activity might be to nonadherents, as long as no one was forced to actually participate. There apparently would be no inquiry into the religious practice itself or its effect on the adherent, the only consideration being whether the government coerced participation in the practice. Such a test could arguably permit a school to conduct a communion service in honor of graduation, provided no one is compelled to participate in the service. Such a test would be appropriate

for free exercise purposes but not for the purpose of whether the government is establishing religion.

The proposed standard also presents difficulties in determining what constitutes "coercion." For example, the federal government, characterizing the practice at issue here as "manifestly benign," apparently believes that government coercion is not present. Although certainly students might perceive significant differences between the level of "endorsement" of religion in an invocation given at graduation ceremonies as opposed to daily prayers recited in the classroom, it is dissembling to say that no level of coercion occurs when students and their families must at least silently tolerate invocations and benedictions at graduation in order to participate in the remainder of the commencement exercises. The only other "choice" is to forego attendance at what is one of the most important occasions in a

student's academic career. Graduation day certainly signifies more to the graduate and his or her family than merely as the day diplomas are distributed.

> Commencement is an impressive and memorable occasion in every secondary school in the United States. It represents the achievement of a goal that students, their parents, and their teachers have worked long and hard to attain. The ritual that surrounds the commencement ceremony bespeaks the significance and dignity Americans place on this very important moment in the life of every student who graduates.
>
> Owen B. Kiernan, Foreword to NASSP [National Association of Secondary School Principals] Commencement Manual, Seventh Revised Edition (1975).

B. Adopting the proposed coercion test will call into question precedents established under Lemon.

If the Court decides in favor of Petitioners on the grounds that government accommodation of religion in civic life does not violate the establishment clause absent some form of government coercion, all the

decisions based under the Lemon test would be called into question. Those who want very much to establish religion in the schools will have found the tool to begin chiseling away at the wall of separation between church and state. For example, many religious groups already seek to challenge this Court's school prayer decisions and the parochial school aid cases on the ground that they interfere with the ability of the school to "accommodate the Nation's religious heritage." It is frightening indeed to contemplate the chaos that would unfold from an implicit reversal of Lemon, particularly at this time.

The United States Amicus brief appears to urge reconsideration of Lemon only in areas outside financial assistance to religious institutions. While Amicus NSBA agrees that it is particularly important that the precedents in this area be expressly left intact, it does not believe that the Court could adopt the coercion analysis without also

producing the perception that the aid to parochial school cases were implicitly reversed. Levitt v. PEARL, 413 U.S. 472 (1973) (statute which provided for reimbursement of nonpublic schools for expenses of certain tests but included no means to ensure tests were free of religious instruction violated establishment clause); Sloan v. Lemon, 413 U.S. 285 (1973) (statutes providing tuition reimbursement to parents of students in nonpublic school unconstitutionally advanced religion); PEARL v. Nyquist, 413 U.S. 756 (1973) (maintenance and repair grants to nonpublic schools and tax benefits to parents with children enrolled in nonpublic schools impermissibly advance religion); Meek v. Pittenger, 421 U.S. 349 (1975) (direct loan of instructional materials and equipment to nonpublic schools and provision of certain auxiliary services for students in nonpublic schools violate establishment clause; lending textbooks to

children in nonpublic schools is constitutional); Wolman v. Walter, 433 U.S. 229 (1977) (loan of textbooks to private school students and providing standardized tests, scoring services, speech and hearing diagnostic services in the nonpublic schools and therapeutic services at a neutral site are constitutional; provision of instructional materials and equipment and unrestricted transportation and services for field trips are unconstitutional); PEARL v. Regan, 444 U.S. 646 (1980) (cash reimbursement to private religious schools for cost of administering and grading of state written tests does not violate first amendment); Mueller v. Allen, 463 U.S. 388 (1983) (allowing deductions from state income tax for educational expense incurred by parents of elementary and secondary school students does not violate establishment clause); Aguilar v. Felton, 473 U.S. 402 (1985) (placing public school teachers in private religious schools to

provide remedial services under federal statute violates the Constitution); School District of Grand Rapids v. Ball, 473 U.S. 373 (1985) (school district violated establishment clause by paying private religious school teachers to teach private school students on religious school premises and sending public school teachers to private schools to teach supplemental courses).

Adoption of the coercion standard would also make suspect this Court's school prayer precedents. See, e.g., Wallace v. Jaffree, 472 U.S. 38 (1985) (moment of silence statute intended to bring prayer into classroom struck down); Stone v. Graham, 449 U.S. 39 (1980) (posting of Ten Commandments in public school classrooms held unconstitutional); Abington School District v. Schempp, 374 U.S. 203 (1963) (Bible reading and prayer not permissible in public schools; cited in Wallace in applying the purpose prong of the Lemon test); Engel v. Vitale, 370 U.S. 421

(1962) (recitation of state composed prayer in public schools is unconstitutional; cited in Wallace in applying purpose prong of Lemon test). Since those cases did not raise the question of sponsorship of any particular religion, under the proposed coercion test, the sole inquiry would be whether the school compelled students to participate in the prayers. If the Court finds no coercion in the case at bar, it could be argued that when a child is permitted to opt out of any religious practice in the school, there likewise is no coercion that would make the practice unconstitutional.

III. The Present Controversy Does Not Require the Court to Develop a New Test for Determining Establishment Clause Violations.

A. The Lemon test has enabled courts to strike down impermissible establishment of religion in the schools.

The United States' Amicus brief in effect urges this Court to engage in "judicial activism" to create a substitute for the Lemon

test. This Court traditionally will not decide constitutional questions in broader terms than are required by the precise state of facts to which the ruling is to be applied, nor if the record presents some other ground upon which to decide the case. Rescue Army v. Municipal Court, 331 U.S. 549, 568-575 (1947). See also, Berea College v. Kentucky, 211 U.S. 45, 53 (1908); Siler v. Louisville & N.R.R. Co. 213 U.S. 175, 191 (1909).

> "A jurist is not to innovate at pleasure...He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles.

B. Cardozo, The Nature of the Judicial Process 141 (1921).

For twenty years application of the Lemon test has enabled courts to prevent government establishment of religion in the classroom. See, e.g., Wallace v. Jaffree, 472 U.S. 38 (1985) (struck down moment of silence statute intended to bring prayer into public schools);

Edwards v. Aguillard, 482 U.S. 578 (1987) (statute requiring teaching of creation science struck down on grounds it had no secular purpose); Stone v. Graham, 449 U.S. 39 (1980)(posting Ten Commandments in public school classroom held unconstitutional).

While it is indisputable that the Lemon test has produced analytical difficulties for this Court and others, its principal liability--its inflexibility--has also been its principal asset in the context of public schools. School board members and educators understand that the Lemon test applies to all religious practices that are conducted by schools. Although this does not guarantee that no teacher will ever lead students in prayer in the classroom during school time or engage in other forbidden conduct, school board officials and school administrators recognize that the practice is unconstitutional or at least that continuation of the practice places them at risk of a

lawsuit. Ethnic and religious diversity has characterized our society, with schools reflecting such differences. It is a tribute to our institutions that by not interfering, this diversity has not torn our social fabric.

If establishment clause precedent is suddenly thrown into disarray by abandoning the Lemon test, schools will face the very kind of religious divisiveness against which the first amendment is intended to guard. See, e.g., Lemon, 403 U.S. at 622.

B. Expansion of Marsh does not undermine applicability of Lemon for determining establishment clause violations.

If this Court should determine that the practice of the school district here is unconstitutional because it violates the Lemon test, many school districts and their communities would be disturbed by the ruling and it would certainly have a major effect on

the practices of most school districts.[1] Irrespective of outcome, however, a ruling would clarify what has been a murky area of the law and certainly would not result in any diminution in the education of school children. (Graduation ceremonies could be solemnized through other means, such as music, poetry readings or moments of silence.)

The Court could also decide this case by expanding Marsh v. Chambers, 463 U.S. 783 (1983), as did the Sixth Circuit in Stein v. Plainwell Community Schools, 822 F.2d 1406 (6th Cir. 1987). Amicus agrees with the United States that one interpretation of Marsh

[1] NSBA did an informal survey of large school districts throughout the country to determine the extent to which the districts are currently permitting invocations and benedictions at graduation. Out of 21 districts surveyed, representing a total student enrollment of 2,652,571, 14 of the districts representing 1,472,103 students, allow graduation invocations. Some of the districts that reported that they do not allow invocations stated that this is a new policy resulting from of fear of litigation or adverse press coverage. Generally, the districts reported that the invocations were "non-denominational," some led by students and others led by ministers. The representatives of the surveyed districts recognized the current potential for litigation, but stated that most of the community does not equate invocations with "school prayer" and supports continuation of the practice.

could result in overturning any civil ceremonial prayer that was not a practice at the time of the drafting of the Constitution. But Marsh could also be interpreted differently, as a recognition that the history of a practice is relevant in determining whether the practice has lost its religious significance, thus making it possible for the state to engage in the practice without establishing "religion." Although such expressions as "In God We Trust" may have religious roots, through repetition and context they have lost their original religious significance. Recognition of this metamorphosis underlies the Marsh decision. It could be argued that only by applying the Lemon test can the Court decide whether the controversy is of a religious nature, and if it is not, then Lemon would not be applicable.

IV. Conclusion

Whatever the decision on the merits in this case, Amicus urges the Court to expressly

affirm the precedent established in its school prayer and aid to parochial school decisions under Lemon.

However difficult the Lemon test may sometimes be to apply, it has been the test for 20 years and school people, students and parents have relied on it. If the Court in this case develops a "new test" assuredly that action will send out a message to schools, students, parents and communities throughout this country that all of the religion in the schools cases are no longer "good law" or at least are questionable.

Amicus submits that this Court should not disturb the Lemon test in the absence of a serious and very important reason to do so. Amicus has informed this Court of the importance of graduation ceremonies. But the validation of graduation invocations is not a reason to disturb Lemon, particularly where there are narrow grounds on which the Court can resolve the controversy, as in this case.

The issue here is important and deserves to be resolved, but not so as to loosen the underpinnings of the school religion cases. Any serious move from the strong stand this Court has held in the past to separate religion and the state will be a clarion call to those who are working to establish religion in the schools.

Our country is unique in the world in its protection of religious freedom. That protection is so fundamental that the Constitution mandates the State to leave all religions alone.

Amicus urges this Court to reaffirm that principle and continue its support of the Lemon test and the cases decided thereunder.

Respectfully submitted,

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